

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its)	Rule and Regulation No. 161
own motion, seeking to amend Title 291,)	
Chapter 1, Rules of Commission Procedure,)	
to rewrite a substantial portion of the rules;)	
correct technical errors, grammar, punctuation,)	
spelling, sequential numbering and the like;)	
and reprint the chapter in its entirety.)	

COMMENTS OF COX NEBRASKA TELCOM, L.L.C.

On August 31, 2004, the Nebraska Public Service Commission ("Commission") opened this rulemaking proceeding to amend Title 291, Chapter 1, Rules of Commission Procedure, to rewrite a substantial portion of the rules; to correct technical errors, grammar, punctuation, spelling, sequential numbering and the like; and to reprint the chapter in its entirety. Written comments on the proposed rules and regulations are accepted until October 15, 2004. In response, Cox Nebraska Telcom L.L.C. ("Cox") respectfully files these comments for the Commission's consideration.

First, Cox believes that a workshop comprised of Commission staff, as well industry would be a preferable way to next discuss the proposed rules. A workshop would enable the various regulated industries to work collectively with the Commission so that additional, constructive input could be gathered. Proceeding to a hearing at the next stage is premature, particularly given the breadth of the proposed changes. While another round of written comments could be gathered, a more efficient expenditure of

time and resources for all involved would be spent meeting face-to-face to resolve our respective concerns.

Second, Cox has concerns regarding various proposed rules that attempt to interpret state statutes. Cox believes that the state statutes should stand on their own, without elaboration unless otherwise required. For example, the statutes regarding ex parte communications are set forth in the Administrative Procedure Act. They are not only straight-forward, but comprehensive. The Commission's proposed rules attempt to interpret and apply the ex parte statutes into rules which is not only unnecessary, but raises the likelihood that misinterpretation will ensue. Cox urges the Commission to simply reference the applicable state statute when required.

Finally, Cox has specific concerns regarding certain rules. Since the proposed changes are extremely voluminous, Cox has focused on only those rules which cause particular concern. Cox hopes that further work can be done with the Commission so that additional input can be provided concerning the rules in their entirety. The specific rules Cox wishes to comment on are as follows:

Rule 001.01F Ex Parte Communication. The proposed rules define matters that are excluded from the ex parte requirements, such as rulemaking proceedings. Cox asks how the Commission intends to treat other dockets, such as Commission investigations. Such dockets generally are not a dispute between parties, and often a hearing is not held. Arguably therefore, this kind of docket should not be subject to the ex parte requirements.

However, this kind of docket is not listed in Rules 001.01F1 through 001.01F3. As indicated earlier, Cox has concerns with the proposed rules interpreting the state statutes, as situations may be unintentionally omitted or included that cause confusion.

Rule 003.01 Initial Pleadings. Cox notices that cease and desist petitions are not contained in the list. Is such an omission intentional? Is this list considered exhaustive?

Rule 005.02 Applications on Other Forms. The previous rule contained a reference to tariff filings. Cox questions why tariff filings should be made using a pleading form. Presently, most tariff filings are made directly by companies using a letter format. Such process seems to have sufficed in the past and Cox questions why the higher standard and increased formality is required.

Rule 007 Copies. The proposed rules require one original, five copies and an electronic submission of each pleading filed with the Commission. If the Commission intends tariffs to be filed using a pleading format, unnecessary copies will be made and additional work will be required without reason. Presently, even if multiple copies of tariffs are filed with the Commission, only the original is accepted. The copies are discarded or given back to the person making the filing. Before making a requirement such as this, it should be determined whether or not an original and five copies and an electronic copy are necessary.

Finally, Cox applauds the Commission for their acceptance of electronic filings. This is an efficient and cost-effective way for parties to make filings with the

Commission. It would be helpful if the Commission would establish an e-mail address that is used specifically for filing purposes. With staff members constantly changing and with dockets being assigned to different personnel, it would be beneficial to have a specific e-mail address for filing purposes; such as filing@mail.state.ne.us. The various regulated industries would then uniformly know where to submit electronic documents.

Rule 010.02 Computation. Cox would appreciate understanding the rationale why the number of days presently used for computation purposes has been increased from five days to eleven days. Cox does not necessarily object to such a change, but would like additional information on why the present time period has more than doubled. Further, Cox questions whether or not such an increase will impact tariff filings which are presently effective, pursuant to state statute, upon ten days notice.

Rule 011.06 Notice of Application. The proposed rule states that notice will be given to interested parties by publishing a summary of the authority or relief sought. Stricken in the proposed rule is the previous language that stated hearing notification will be provided by mail. In reading the subsequent rule, it seems that a summary will be published in the Omaha Daily Record.

Cox suggests that the Commission could indeed strike the present mailing requirement, but should begin to use electronic notification as a means in which to notify parties of authority or relief sought. Many other state regulatory commissions either post daily filings on their website, or utilize a list-serve in which e-mail notification is

provided to interested parties regarding docket activity. While the Omaha Daily Record has certain usefulness in being the Commission's official form of notification, a more open and friendly means of communication would be to utilize a list-serve to send e-mails to interested parties, or to expand the commission's website. This will increase awareness of the Commission's activities.

Rule 015.01C Approval by the Commission. This proposed rule indicates that the Commission will begin determining whether a request for Formal Intervention is acceptable. Presently, such a formal decision-making process is not conducted. Currently, Formal Interventions that are timely filed are accepted, unless objections are raised by a party to the proceeding. In such a case, the Commission may hear the matter in an oral argument and render a decision whether the Formal Intervention should be accepted. The proposed rule reflects that the Commission will now begin to grant or deny requests for Formal Interventions. Will Commission staff review all such requests? What criteria will be used to determine whether or not a request for Formal Intervention is acceptable? Will official orders be entered granting or denying requests for Formal Intervention? If orders are not entered, how will parties in a proceeding know if a Formal Intervention has been granted?

The proposed rule seems to create more work for the Commission without any tangible benefit. If a party to any case opposes a request for Formal Intervention, it can express its objection to the Commission in a responsive pleading. Such a situation seldom occurs, and even when an objection has been filed, the Commission has rarely denied a Formal Intervenor's participation. Instead, the Commission may limit such

participation or deem that it will give the Formal Intervenor's participation the proper weight that it deserves. To create a step of now approving all requests for Formal Intervention, when they are seldom, if ever challenged seems unduly burdensome and bureaucratic.

Finally, Cox notes that parties wishing to file a Protest with the Commission are not judged like those seeking Formal Intervention status. The level of participation and the status of Protestants and Formal Intervenors as parties are equal, yet Protests are accepted by the Commission without review, whereas Formal Interventions are not. This disparity will likely cause parties to begin filing Protests to applications rather than Formal Interventions so as to ensure participation is permitted.

Rule 015.01D Participation in Proceedings. Like the disparity raised in the preceding paragraph, the Commission proposes to develop new rules which limit a Formal Intervenor's participation. No such limitations are listed for Protestants, yet both are parties in a proceeding. Therefore, again companies that wish to fully participate in a case would be better off choosing to file a Protest rather than a Formal Intervention. There are less limitations and the request is not subject to denial.

Cox also questions the Commission's pre-determined limitations being set forth in rule. Cox has participated in dockets where such limitations were imposed, but they have been imposed as part of a prehearing conference providing opportunities for parties to be heard. And even then, limitations were imposed on *all parties* to the proceeding, including the applicant, not just the Formal Intervenors. The proposed rule provides

participatory limitations merely for Formal Intervenors. We hope the Commission did not intend this outcome.

Rule 015.02B Approval by the Commission. Like the concerns expressed previously in Rule 015.01C, the Commission is creating an unnecessary step in requiring an affirmative grant or denial to each request for Informal Intervention it receives. A more efficient approach would be to accept all timely filed requests, provided that objections by interested parties may be filed and heard. This process is currently how such requests are treated.

Rule 016.01 Designation. The proposed rule requires the designation “(CC)” after the docket number on all documents. The rule proposes to anticipate those dockets that are ‘likely to become’ a contested case and give them a special designation. Such a designation before it is actually a contested case is premature if the intent is to alert the Commission and industry of ex parte requirements.

Rule 016.02 Prohibition Against Ex Parte Communication. Concerns have already been expressed regarding the proposed rules interpreting state statutes. Cox reiterates that the Administrative Procedure Act should remain the source of information concerning ex parte communication and that a mere reference in the rules to that statutory section would be preferable.

Rule 017.03 Objection to the Order. The proposed rule indicates that modification to a Planning Conference Order will not be made unless to prevent manifest injustice. Such a high standard seems unnecessary given that parties routinely agree to extensions of time in complex cases. Further, the Commission often extends deadlines on its own motion. To require a manifest injustice to be found in such situations seems excessive.

Rule 018 Evidence. As has been stated earlier, Cox does not believe the Commission needs to reiterate in its rules provisions of law, such as the Rules of Evidence, which are already fully documented.

Rule 018.30 Confidential Information. This section will be difficult to implement. The proposed rule states the Commission will issue a decision within ten days of receiving a motion for confidentiality, and that objections to the motion must be made within five days. It could be the case where parties learn of the confidential filing *after* the five-day period has expired. Further, Cox asks what means of notification the Commission will give parties to swiftly inform them that the confidential filing has been made. There may be circumstances, in an investigative docket, for example in which interested parties are not yet identified. A longer period of time seems necessary in order to provide parties with appropriate due process to object to motions for confidentiality.

Rule 0022.01H. The status of any settlement discussions or alternative dispute resolution efforts. This proposed rule should be deleted in its entirety. Settlement discussions that may have ensued prior to the Commission's involvement likely involve confidential

discussions that took place between the parties. Such discussions should not be disclosed to those not involved with the settlement process. Creating a rule in which parties might be forced to reveal the status of their settlement discussions and/or alternative dispute resolution efforts will hinder such discussions knowing that if the efforts fail, all concessions made as part of the settlement will be made public. The Commission should not require parties to inform it of their prior efforts to amicably resolve a case. When it comes to the Commission for resolution, such discussions are no longer relevant.

CONCLUSION

In closing, Cox appreciates the opportunity to comment on the proposed rules. We hope the Commission will consider proceeding to a workshop next so that further input can be gathered.

Dated this 15th day of October.

Respectfully submitted,

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